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Article 18

Corporations--Right of Corporation to Purchase Its Own Stock (Cross v. Beguelin, 252 N.Y. 262 (1929))

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pensing with the exaction of special security from an appearing defendant in a foreign attachment." Referring to the bank's position, the Supreme Court said that although the bank may be called upon to pay twice, it is no reason for declaring the statute unconstitutional, as when it contracted with the depositor, it was cognizant of the statute and its effect, and it voluntarily accepted the consequent responsibility. The Court indicates that though the statute is constitutional, it is, nevertheless, a harsh measure. We fail to appreciate the alleged hardship. As pointed out by the Court of Appeals,[7] the husband having chosen New York State as his domicile, he is deemed to submit and acquiesce in any law of the state affecting his property, which is or may be in force. If he subsequently abandons his wife and child in this state and they are so destitute that they may become public charges, the state, in furtherance of the welfare of the community and under a proper exercise of its police power, may sequester his property and use the same for the support and maintenance of his wife and family. The basic facts upon which such relief may be granted are: (a) The marital relationship and domicile within the state; (b) the abandonment by husband or parent and his absence from the state; (c) the necessary property or *res* within the state. In this type of proceeding the absconder is represented by the bank which may set up such defenses as would be available to him. He is not divested of his right, upon his return, to nullify the entire proceeding if he can prove the absence of the necessary jurisdictional facts. What the legislature intended was to provide for the case where a husband had property within the state and was concealing himself or had disappeared, leaving a wife and family without means and a possibility of becoming public charges, despite the fact that the property may be sufficient to properly provide for them. Under such circumstances, to render the property inaccessible to them, would severely tax one's sense of fairness and justice. Lack of remedy in such a case would mark the law as impotent.

E. H. L.

CORPORATIONS—RIGHT OF CORPORATION TO PURCHASE ITS OWN STOCK.—Upon the authority of a resolution of its board of directors, a corporation contracted with one of its stockholders to purchase his holdings at a specified sum. At the date of the execution of the contract, the corporation's surplus was in excess of the price agreed upon. Plaintiff delivered his stock to the corporation and received part of the stipulated payments. The corporation thereafter became financially embarrassed and its assets were turned over to a creditors' committee which took over the management and control of the corporation and sold its assets. Included in the assets sold were the shares formerly owned by plaintiff. At the time of the assignment it was agreed

[7] 250 N. Y. 136, 164 N. E. 882 (1929), opinion by Cardozo, *Ch. J.*

that it should affect neither the merits of the plaintiff's claim for the balance of the purchase price of his stock nor the right of the other stockholders to dispute it. In conformity with this agreement, the creditors disbursed the corporate assets, satisfying all the claims of creditors except that of the plaintiff for unpaid instalments due on the purchase of his stock and the claims of two officers for salaries which had accrued subsequent to the date of the stock purchase contract, these officers having participated in the vote approving the purchase. The funds in possession of the creditors' committee are insufficient to pay in full the three claims and the question at issue is whether or not plaintiff's claim, which is prior to that of the officers for salary, is valid and he should participate pro rata with them, or whether plaintiff's claim should be declared invalid. *Held,* plaintiff's right was superior to the claims of the corporation's officers for salaries accruing subsequent to the purchase contract of which they had notice; the agreement of the corporation to purchase its own stock, though prohibited by law, was enforceable as against the assets in the possession of the creditors' committee since neither the corporation nor its stockholders objected. Cross v. Beguelin, 252 N. Y. 262, 169 N. E. 378 (1929).

In the absence of statutory or charter restriction, a corporation has inherent power to purchase its own stock providing it is not to the prejudice of creditors.[1] The assets are deemed to constitute a trust fund for the benefit of creditors whose obligations must be discharged in full before the right of any stockholder to any portion thereof can be considered.[2] By statute,[3] a director who votes to apply the funds of a corporation except surplus, directly or indirectly to the purchase of its own stock, is guilty of a misdemeanor. While the directors are not criminally liable if a surplus exists at the time of their action, an agreement under which payment for the stock is deferred is not valid as a binding contract unless there be a consideration other than the mere promise of the corporation. The promise of the corporation is but an illusory promise, for the enforceability of the agreement depends upon the continued existence of a surplus, a condition which as between the parties, is entirely within the control of the corporation.[4] "The rights of the creditors of the corporation cannot be defeated by the fact that at the time the transaction was entered into the seller of the stock and the officers of the company

[1] City Bank of Columbus v. Bruce, 17 N. Y. 507 (1858); Vail v. Hamilton, 85 N. Y. 453, 457 (1881); Joseph v. Raff, 82 App. Div. 47, 54, 81 N. Y. Supp. 546, *aff'd* 176 N. Y. 611, 68 N. E. 1118 (1903).

[2] Hollins v. Brierfield, etc. Co., 150 U. S. 371, 381, 383, 14 Sup. Ct. Rep. 127 (1893); McDonald v. Williams, 174 U. S. 397, 401, 19 Sup. Ct. Rep. 743 (1899); Trotter v. Lisman, 209 N. Y. 174, 102 N. E. 572 (1913); First Trust Co. v. Illinois Cent. R. R. Co., 256 Fed. 830 (C. C. A., 8th, 1919).

[3] Penal Law, Sec. 664.

[4] Topken, Loring & Schwartz, Inc. v. Schwartz, 249 N. Y. 206, 163 N. E. 735 (1928); Richards v. Ernst Weiner Company, 207 N. Y. 509, 160 N. E. 592 (1912); Note (1929) 3 St. John's L. Rev., 276–280.

who purchased it were acting in good faith and supposed that the corporation was solvent." [5] In this case, however, all claims of prior creditors had been satisfied and subsequent creditors (the officers) had notice of the agreement to buy back the stock. Even though there was no contract according to the tenets of former decisions of the court,[6] recovery was permitted. Hence the rule seems to be that recovery may be had under an agreement to buy back stock as against creditors who had notice of the agreement. This result departs from mechanistic legal reasoning—for an agreement heretofore held to be utterly void is in this instance, for sound reasons, enforced.

R. L.

HIGHWAY LAW—NEGLIGENCE OF OPERATOR OTHER THAN OWNER ATTRIBUTABLE TO OWNER.—Plaintiff was struck and injured in New York City by defendant's automobile which was being operated by defendant's son at the time of the accident. The injuries were the result solely of the negligence of the operator of the car. Defendant disclaimed liability on the ground that at the time of the accident his son was not operating the car in his business or with his permission. He testified that he had given his permission for the use of the car on Long Island but had expressly forbidden its being taken into the city. The question with respect to the circumstances under which the car was taken out on the particular occasion was not tried before a jury, the parties having stipulated to waive a jury. The trial Court directed a verdict for the plaintiff, holding that where the owner intrusts his car to another to be used in the business or pleasure of the driver, a violation of restrictions upon the route to be taken should not relieve the owner from liability under the statute. On appeal, *held,* error. The Highway Law [1] imposes no liability on the owner for the negligence of one who uses the automobile unlawfully or without permission of the owner. Chaika v. Vandenberg, 252 N. Y. 101, 169 N. E. 103 (1929).

Evidence as to the owner's instructions to a person driving his car is admissible to show the extent of his authority. The intent of the legislature was not to make an arbitrary rule of liability on the part of an owner for all accidents caused by the negligent operation of his car but only in cases where an agency can be spelled out and where the person is "legally using the same with permission of the owner," which is interpreted by the instant case and a number of

[5] *Re* Fechheimer Fishel Co., 212 Fed. 357, 363 (C. C. A., 2nd, 1914).

[6] *Supra* Note 4.

[1] Sec. 282-e (Cons. L., Ch. 25), now Vehicle and Traffic Law, Sec. 59 (Cons. L., Ch. 71): "Every owner of a motor vehicle * * * operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle * * * in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner."